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NTSB Order No. EA-4933

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 7th day of January, 2002

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JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	
v.)	Dockets SE-15824
)	and SE-15825
)	
ROBERT COLLINGS and)	
GORDON SCHMIDT,)	
)	
Respondents.)	
)	
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OPINION AND ORDER

The Administrator has appealed from the oral initial decision of Administrative Law Judge William R. Mullins issued on February 24, 2000, following an evidentiary hearing.¹ The law judge found no merit in the Administrator's argument that respondents had violated 14 C.F.R. 91.111(c), 91.119(b), and 91.13(a) of the Federal Aviation Regulations ("FAR," 14 CFR Part

¹ The initial decision, an excerpt from the transcript, is attached.

91),² and he dismissed the two complaints. We deny the appeal.³

Respondents Collings and Schmidt were pilot-in-command and second-in-command, respectively, of a B-24 Bomber on a flight in the vicinity of Minneapolis-St. Paul Airport on July 12, 1998. The Collings Foundation owns and operates the World War II aircraft (and other vintage airplanes) and exhibits them throughout the country, giving people tours and taking them on short rides. Respondent Schmidt was a voluntary pilot for the Foundation, and was also a fulltime Northwest Airlines' (NWA) pilot. This case stems from Mr. Schmidt's proposal to use the B-24 to salute NWA Captain Alfred Owens, also a Collings Foundation volunteer pilot, on his last flight (namely, a Boeing 747 Part 121 flight from Japan) before retiring from NWA.⁴ Mr. Schmidt contacted Giles O'Keefe, an NWA dispatcher, about the possibility of using the Collings Foundation B-24 to "escort"⁵

² FAR section 111(c) prohibits carrying passengers for hire in formation flight. FAR section 119(b), as pertinent, prohibits flight below 1000 feet over congested areas, except where necessary for takeoff or landing. FAR section 91.13(a) prohibits careless or reckless operation that would endanger the life or property of another.

³ We grant the Administrator's motion to strike certain statements by respondents concerning whether the Administrator had taken any adverse action against any Air Traffic Control (ATC) personnel in connection with this incident. There is no record evidence bearing on the matter.

⁴ There apparently is a traditional ceremony for retiring pilots landing at Minneapolis-St. Paul, once the aircraft has landed and is taxiing to the gate. Respondent Schmidt wanted to do more.

⁵ A key issue in the case is whether an unapproved formation flight took place. Respondents, instead, claim that there was no formation flight, but that the B-24 merely escorted Captain Owens' 747. Our use of the term "escort" here is not

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the 747 on the last few miles of its flight. Mr. O'Keeffe agreed to inquire about it with Minneapolis-St. Paul ATC and NWA management. Joint Exhibit 2, Notes of Mr. O'Keeffe. ATC told Mr. O'Keeffe that such a flight was possible, but they needed more details.⁶ He then put Mr. Schmidt in contact with the designated ATC personnel. He, in turn, contacted NWA management and was told, in his words, that the airline would "buy the seats on the B24 to guarantee the flight, and that [he] could give the seats away to whomever [he] chose." *Id.* at 1. (NWA management did ask that media coverage be arranged, and it was. It does not appear that NWA management had any further involvement in the arrangements.) NWA paid the Collings Foundation \$2,500. The Collings Foundation invoice (Respondents' Exhibit B) states that it is for a "donation for local celebration flight."

The day of the flight, respondent Schmidt consulted with Mark Ambrosen, that day's terminal radar control facility supervisor (see Joint Exhibits 11 and 12, a memo and a report by Mr. Ambrosen regarding the event). The procedure agreed to was that the B-24 aircraft would intercept the NWA flight a few miles from the airport and fly with it toward the runway. ATC agreed

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dispositive. Mr. O'Keeffe, in his written notes, *infra*, used that word.

⁶ See Joint Exhibit 3, partial transcript of telephone conversation between O'Keeffe and Minneapolis Tower Area Manager Dave Praymann (Praymann: Ambrosen is in in the morning and he's a B-24 expert because his dad rode on that airplane and he got them in a low pass here the other day. O'Keeffe: Good, that's what we want again tomorrow if we can do it. Praymann: I suspect we can

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that the two aircraft could use the airport emergency frequency to communicate with each other. In the words of Mr. Ambrosen, the aircraft would "formation fly 'wing tip to wing tip'" down the runway. Joint Exhibit 11 at 1. The 747 would perform a missed approach and come around and land. The B-24 would break off and depart the area (for return to the nearby airport from which it took off).

Everything went according to plan. Aside from a local cameraman, all the passengers (there were seven) were friends or friends of friends. A few were NWA employees. None paid any money for the flight. And, although the parties disagree somewhat, it appears that, while the Collings Foundation may have come close, it did not cover the cost of the flight. No one at the time voiced any concerns about the plan or its execution being unsafe.⁷ Indeed, in recognition of the fact that ATC was so integrally involved, the Administrator proposed to waive any sanctions against the respondents. Nevertheless, she argues, ATC involvement does not moot respondents' failure to comply with regulations they should well know regarding formation flight and low flight.

We might agree with the Administrator regarding waiver of

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work something out.).

⁷ The difficulties apparently arose because Captain Owens' crew was not briefed by him that this escorting would be occurring; his co-pilot was quite surprised and upset and contacted his supervisors, although he also testified that he saw no safety issue at all in the way the flights actually took place.

sanction being the appropriate approach here, see Administrator v. Gartner, NTSB Order No. EA-4495 (1996), were the charges to have been proven. However, we do not reach the question because, based on our analysis of the record and the facts established, we must conclude that the Administrator did not prove either violation by a preponderance of the evidence. Thus, the issues of sanction and government estoppel briefed by the parties do not come into play.⁸ We address the charges in turn.

1. Formation flight. A formation flight may not carry passengers for hire; both respondents testified they knew this fact. Assuming for purposes of discussion that the B-24 was carrying passengers for hire, we must decide whether the two aircraft operated in formation.

All parties agree that, while there is no regulatory definition of formation flight, there is a working definition in the AIM.⁹ To summarize it, a "standard formation" (a nonstandard one clearly did not occur here) requires: 1) prior arrangement between the pilots; 2) operation as a single aircraft for navigation and position reporting (the testimony indicates that this is accomplished through only one aircraft using its transponder); 3) one aircraft designated the flight leader; and 4) maintenance of a standard distance between the aircraft that

⁸ We cannot completely follow the law judge's reasoning and do not agree with all of it. What follows is our analysis of the record. There are no credibility issues here for which we might defer to the law judge's conclusions.

⁹ Aeronautical Information Manual, Joint Exhibit 13.

is no more than 1 mile laterally or longitudinally and 100 feet vertically, except for transitional maneuvers.

There are too many holes in the facts to allow a conclusion that a preponderance of the evidence supports a formation flight finding here. First, although Mr. Schmidt and Mr. Owens had a conversation, Mr. Owens, at least according to the unrebutted testimony, did not know in advance the details that Mr. Schmidt had worked out with ATC. While the Administrator ignores the point, it is also clear that the NWA 747 was not designated the lead aircraft, nor did the B-24 turn off its transponder so that there was only one signal for navigation and position reporting purposes. Both aircraft communicated independently with ATC, and both received their own clearances and directions. Although the aircraft did fly in close proximity, this is as equally consistent with an escort flight as it is with a formation flight. Further, as the Administrator's proffered radar data indicate, the aircraft were more than 100 feet vertically apart for most of the flight, which is inconsistent with the AIM definition of a formation, and the aircraft were rarely next to each other.¹⁰ The two aircraft did not maintain the same relative position near each other, as formation flight intends. With these facts, it is not enough that respondent Schmidt may

¹⁰ Administrator's Exhibit 26 at page 3 and Transcript (Tr.) at 159. Administrator v. Ricker, 5 NTSB 299 (1985), cited by the Administrator, involves considerably different facts, notably both aircraft cleared to land on the same runway, a clear leader and follower, and the pilot of the following aircraft using terms such as "in trail" and "playmate."

have once called the flight a formation flight in his airborne communication with ATC, or that others may have called it a "flight of two," which apparently may also include escort flying. Finally, in reaching this conclusion we have also taken into account the circumstances here that respondents were long-time pilots, that they knew that flying formation with passengers was not permitted, and that there is no suggestion they would risk their licenses or compromise safety for this celebration flight, that they saw escorting the 747 in to the airport as something different, and lawful, and that ATC obviously did, too. Accordingly, we agree with the rejection of the section 91.111(c) charge.

2. Low approach over a congested area when not necessary for takeoff or landing. The law judge dismissed this charge, on finding that clearances to do so had been given. The Administrator does not appeal this finding, and we affirm the law judge. The finding is supported by substantial evidence, including testimony of the Administrator's witnesses. Tr. at 139.

3. The careless allegation. The Administrator makes clear in her appeal that this charge is residual to the formation flight operational violation. Having dismissed the operational charges, this one must fail as well.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied;
2. The Administrator's motion to strike is granted; and

3. The initial decision is affirmed to the extent it is consistent with this opinion and order.

BLAKEY, Chairman, CARMODY, Vice Chairman, and HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.